> capacity would keep prices higher than they would be if the systems were properly expanded.
>
> There is also an intuitive reasoning to these scenarios that does not require sophisticated economic analysis. If a cellular carrier is keeping prices high to discourage demand when capacity is clearly available, then the public is losing some of the service it ought to enjoy. If a carrier is refusing to expand capacity because the additional supply would depress prices, then the public is losing the service it ought to enjoy due to the new investment. In either case the cellular wholesaler would be abusing the public trust placed in it by the FCC in its licensing decision and by this Commission in its grant of the CPCN to serve the public.
>
> As we have discussed, it is the proper public policy to forbear from any rate of return or profit-based regulation of cellular wholesalers that are pricing their services competitively. However, we would be disposed quite differently towards a cellular wholesale carrier that violated the public trust by withholding services to make extra profits. In such an instance occurred, we would initiate an investigation of the rates of the carrier in question and impose an appropriate and punitive constraint on its profits.

Id., 36 CPUC2d at 495.

The majority elected to provide the industry with the opportunity to demonstrate that genuine competition existed between the duopolists. Specifically, it rejected regulation of the industry in favor of steps which would "enhance competition." *Id.*, at 494.[1] The majority's expectation was that if competition were to emerge to discipline the duopolists the evidence would be furnished by falling rates. To that end the majority adopted what it termed a scheme

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1Commissioner Frederick R. Duda dissented contending that the majority's tolerance for a continuation of rates which he deemed to be excessive amounted to an abdication of the Commission's responsibility under Public Utilities Code Section 451 which requires that all rates subject to the Commission's jurisdiction be "just and reasonable." 36 CPUC2d at 520. Commissioner Duda based his opinion that rates were excessive on data provided by the Commission's Advisory and Compliance Division that showed that five carrier in three major markets earned returns on investment ranging from over 20 to more than 50 percent. Other participants in the Phase II proceeding had offered evidence that investment returns for the industry actually ranged from 25 to 123 percent.

of pricing flexibility to ensure that the Commission's regulatory process would not stand between duopolists bent on lowering prices and a consuming public too long in need of such relief.[2]

The Commission's findings and expectations were made quite plain:

> . . .The record generally indicates that limits on the spectrum are not a constraint on carriers at the present time. Given the rapid growth in consumer demand for cellular service, that circumstance may change for at least some systems. However, for underutilized systems we will expect rates to fall substantially and quickly following our grant of pricing flexibility. . . Further, California's major markets should be converting to digital service as soon as that technology is commercially available. Digital conversion will provide three to four times the present capacity. Carriers will need to cut prices sharply to fill that capacity. If they do not, then we will do it for them based on the results of our monitoring. We will also expect the geographical scope of service availability to continue to expand, with corresponding service quality improvements for the more rural or outlying areas in each service territory.

Id., at 496.

Three years later virtually none of the Commission's expectations have been met by industry performance. While many urge that the fatal flaw is the expectation that duopolists will

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2As approved by the majority the emphasis was upon facilitating price decreases. Price increases were conditioned upon justification for an upward departure from what the Commission already deemed high rates.

> Duopoly carriers seeking an increase in rates should be required to substantiate their request with market studies specifically based on data within their MSAs. If a carrier wishes to support its request for an increase based on financial hardship, then cost support and income data of a form specified by CACD should be supplied, and the carriers should be prepared to respond to other PUC staff requests for supporting financial data. The carrier should also describe the utilization of its system relative to its current engineered capacity. Although a return on investment is not a driving force in setting rates, the carrier should be required to show its actual return on investment and projected return on investment based on proposed rates. Any major increase in return on investment from a three-year recorded average should be supported with specific reasons for the change. Any decreases in rates need not include a market study. Duopoly carrier should file such requests via the advice letter procedure.

Id. 36 CPUC2d at 496.

engage in meaningful competition, the industry has a different explanation as to why basic cellular rates in all segments of the California market have remained at their historic high levels. It is all the Commission's fault! The flexible pricing scheme which permitted carriers to reduce rates up to 10% on one days notice but required a substantiation for rate increases in an advice letter filing has "chilled" the carriers' desire to lower prices. Why? Because of a fear that once a price was lowered the Commission would obstruct a movement back to the old level. We need not comment on the merits of this argument for we intend to test its underlying premise.

The proposed guidelines are intended to give carriers that lower prices flexibility to raise rates to previous levels effective on one day's notice. No justification for the return to previous rate levels will be required. During the pendency of our Phase III proceeding existing rates will serve as a cap absent a justification for higher exactions in conformity with our order in Phase II. Adoption of this instant down with a right of return policy is voluntary with respect to each carrier. Whether it frees the industry to engage in the rate reductions allegedly thwarted by the terms of our Phase II orders will quickly be known. Those results will be far more telling than advocacy in determining whether competition can be trusted to stand in lieu of regulation in vindicating the public interest.

. . .

The guidelines are intended to serve as an interim measure subject to suspension or modification upon Commission action in Decision (D.) 92-10-026 rehearing requests and subject to the issuance and resolution of an investigation into mobile telephone service and wireless communications. Irrespective of its tenure, the guidelines are seen as an opportunity to simplify the existing cellular regulatory framework and to provide cellular carriers an opportunity to demonstrate that cellular competition does exist in California.

The guidelines are also intended to be used as an alternative to satisfying Ordering Paragraph (O.P.) 9 1 of the Phase II Cellular Decision's stringent requirements (1990) 36 CPUC2d 464 at 516. Under the guidelines, cellular carriers that reduce rates would be assured that they could raise rates back to their current levels without justifying a return to

previous rate levels. The requirements of O.P. 9 would continue to apply for all rate increases beyond the carrier's existing rate levels.

Discussion

Comments and reply comments on the guidelines were received from cellular metropolitan and rural wholesale carriers, resellers, cellular associations, and organizations representing end users. They express unanimous support for the guidelines approach as a solution for price flexibility in the California cellular market. However, the guidelines did not fully satisfy the duopolists desire for flexibility. Contrary to the admonition in the assigned commissioner ruling, some parties sought to revisit Phase II Cellular issues. The invitation is declined. Such an expanded scope would require notice to the parties that additional issues would be considered and delay the implementation of the immediate opportunity for rate relief.

Several comments suggested a relaxation of the 60-day notice period to wholesale customers prior to the effective date of any rate increase. The purpose of the 60-day notice period is to afford wholesalers an opportunity to respond to rate increases. As facilities based carriers, duopolists have discretion in making rate changes, wholesale customers on the other hand are at the mercy of the duopolists. A wholesale customer will have no say as to when a rate increase will occur, whereas a duopolist can spend weeks or months studying market data before announcing a rate increase. The guidelines proposed a 60-day notice period for wholesale rate increases in order to give wholesale customers an opportunity to evaluate their options, i.e., pass on the rate increase to existing customers versus absorbing the increase and sustaining a loss in revenue. We therefore decline to reduce the notice period to wholesale customers for rate increases.

The facilities based carriers also argued for the expansion of rate changes from a rate element by rate element basis to a net impact of changes in an average cellular customer's rate structure. Net impact was defined to include tariff terms and conditions as well as rates. The cost of using a cellular phone includes a connection charge as well as charges for peak and off peak usage. Under the current proposal any reduction for one element would have to match with a corresponding reduction in the wholesale rate in order to maintain the current margin. We desire such an approach because of its ministerial character. Thus, we decline at this time to adopt the recommendation made by the duopolists. One of the primary purposes of this decision is to address the allegations of the duopolists that California has high cellular rates because of regulation. We believe adopting a net impact approach will produce regulatory gridlock because the parties involved will not be able to reach consensus on what constitutes an average customer's rate structure. However, if <u>all</u> the parties to this proceeding are able to reach consensus on a formula or approach to implementing a net impact analysis, we will entertain a petition to modify the rate element by rate element approach to modifying rates.

An expansion of the guidelines to include more flexible proposals brought forth in the comments and reply comments may be considered in the future. For example, an expansion of promotional offerings is currently being considered in Los Angeles Cellular Telephone Company's petition for modification of the Phase II Decision as modified by D.90-10-047 and D.92-02-076.

Therefore, the guidelines circulated for comment should be adopted in whole.

Findings of Fact

1. The assigned Commissioner to this investigation issued a ruling seeking comments on cellular rate band pricing guidelines.
2. All parties of record were served a copy and invited to comment on rate band pricing guidelines.
3. Comments received from interested parties unanimously supported cellular service pricing flexibility.
4. All comments and reply comments received from interested parties addressing the guidelines were considered in establishing an interim rate band pricing guidelines for cellular utilities.

Conclusions of Law

1. Cellular rate band pricing guidelines should be adopted to the extent provided below.
2. Because of public interest in competitive cellular service, the following order should be effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. Cellular carriers and resellers shall have the option of implementing the rate band pricing guidelines attached to this order, as Appendix A.
2. The rate band pricing guidelines shall be used as an interim procedure subject to suspension or modification upon Commission action in Decision (D.) 92-10-026 rehearing requests and issuance and resolution of an investigation into mobile telephone service and wireless communications.

3. The Executive Director shall mail a copy of this order to all certificated cellular wholesalers and cellular resellers.

This order is effective today.

Dated April 21, 1993, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
P. GREGORY CONLON
Commissioners

Appendix A

R A T E B A N D P R I C I N G G U I D E L I N E S

GENERAL RULES

1. These rate band pricing guidelines are established within the regulatory framework authorized in the Phase II Cellular Decision (D. 90-06-025), to allow more pricing flexibility to cellular carriers and resellers.

2. This rate band pricing flexibility is available to any cellular carrier or reseller requesting pricing flexibility by advice letter that specifically follows these guidelines. The advice letter will be considered a compliance filing and will be effective on the date filed.

3. The existing tariffed wholesale and retail rates, for rate plans in effect at the time the company's rate band guideline advice letter is filed, will be considered the rate band price ceilings for those plans. Rates for these guidelines will be defined as any rate element (i.e. recurring rate) or charges (i.e. any non-recurring rate). No retail or wholesale rate can be raised above the established ceiling pursuant to these guidelines.

4. The cellular companies have the option of choosing when to include a rate plan and which rate plans, if any, the company wants under the rate band pricing guidelines. Tariffs for any rate plan submitted under the rate band guidelines must state in the advice letter filing that the plan is submitted under the rate band guidelines, and identify in the tariff both the ceiling rates, which are the current tariffed rates, and the new rates under separate column headings next to each other.

5. Rate band pricing guidelines apply to tariffed rates only and do not apply to tariffed terms and conditions. Changes to terms and conditions, including early termination penalties, can be made under existing G.O. 96-A requirements and should not be combined with rate changes in rate band tariff filings.

6. New rate plans, which are different from existing rate plans, cannot be included under the rate band pricing guidelines until the plans become effective tariffs under existing rules. For example a new plan filed under temporary tariff or regular notice cannot be considered under the rate band pricing guidelines until any protests filed against the plan have been resolved and the new plan becomes permanent.

RATE REDUCTIONS

7. For the rate band pricing guidelines only, any tariffed rate in a rate plan may be reduced by any amount through the filing of an advice letter. The new rate(s) will be effective on the date the advice letter is filed. Master customer tariffs can be reduced under these guidelines as long as the minimum margin over wholesale rates is maintained per O.P. 18 of D.90-06-025, as modified by D.90-10-047.

8. These rules do not affect a carrier's ability to lower rates in rate plans the utility chooses not to include under the rate band pricing guidelines. However such lowered rates can not be raised pursuant to guidelines established herein. Instead the carrier must follow the procedures set forth in O.P. 9 of D. 90-06-025.

9. Rate reductions under a carrier's retail tariff need to have an exact, corresponding reduction to the same rate element under the carrier's wholesale tariff, which maintains a consistent per cent between current wholesale and retail rate offerings and reduced rates requested under these guidelines.

For example, if the access charge under the carrier's retail basic plan was reduced by 10%, the advice letter filing must also include a 10% reduction in the access charge of the wholesale basic plan. If the retail access charge element ceiling is $45.00 and is reduced to $40.50, then the wholesale access charge needs to be reduced by the same percentage from the ceiling rate of $32.26 to $29.03.

10. If a carrier has a retail service currently tariffed which does not have a direct, corresponding wholesale equivalent service, and the carrier wants to file tariff changes to the retail service under these rate band guidelines, then the carrier must file a direct, corresponding wholesale equivalent service. The rate margins for the carrier's new wholesale equivalent offering must be filed using the same margins as are currently found under the carrier's basic plan. This rate band requirement is consistent with the existing policy regarding wholesale service margins.

RATE INCREASES

11. As stated in the general rules above, each company's existing retail and wholesale rates are the rate ceiling. No retail or wholesale rate may be raised above that price ceiling without a showing according to O.P. 9 of D. 90-06-025.

12. Advice letters for retail rate increases that do not exceed the rate band ceiling shall become effective on one day's notice. Rates for customers under contract cannot be raised during the contract period agreed to by the customer.

13. Each retail customer must be individually notified of a rate increase (e.g. bill inserts, bill notices, or letters). Newspaper notices are not acceptable. A copy of the retail customer notice must be submitted with the advice letter to CACD.

14. Wholesale rate increases require 60 days notice to wholesale customers (resellers) or master customers prior to the effective date of the rate increase. During this time, resellers must notify their customers, if they intend to pass on the rate increase.

15. Each wholesale customer and master customer must be sent a copy of the advice letter indicating the rate increase. Newspaper notices are not acceptable.

16. Commission approval is not required for retail or wholesale rate increases which fall within the rate band, as long as margins are preserved and all other rate band guidelines are followed.

17. Wholesale rate increases must have an exact corresponding retail rate increase under the carrier's retail tariff which maintains the margin. The retail rate increase need not be concurrent with the wholesale rate because of the different notice requirements. Retail rates may of course be raised without raising wholesale rates, up to the existing price ceiling.

(END OF APPENDIX A)

ATTACHMENT 11

CPUC Decision 94-04-042

ALJ/BTC/sid

Mailed

APR 8 1994

Decision 94-04-042 April 6, 1994

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of the American Telephone and Telegraph Company, Ridge Merger Corporation and McCaw Cellular Communications, Inc. for Authorization to Transfer Indirect Control of Airsignal of California, Inc. (U-2028-C); Alpine CA-3, L.P. (U-3040-C); Bay Area Cellular Telephone Company (U-3007-C); Cagal Cellular Communications Corporation (U-3021-C); California InterCall, Inc. (U-5176-C); Cellular Long Distance Company (U-5228-C); Fresno Cellular Telephone Company (U-3014-C, U-4040-C); Los Angeles Cellular Telephone Company (U-3009-C); Napa Cellular Telephone Company (U-3016-C); Redding Cellular Partnership (U-3020-C); Sacramento Cellular Telephone Company (U-3013-C); Salinas Cellular Telephone Company (U-3018-C); Santa Barbara Cellular Systems, Ltd. (U-3015-C); Stockton Cellular Telephone Company (U-3012-C); and Ventura Cellular Telephone Company (U-3010-C) from McCaw Cellular Communications, Inc. to the American Telephone and Telegraph Company.	Application 93-08-035 (Filed August 24, 1993)

(See Appendix A for Appearances.)

SEP 30 1994

I N D E X

I N D E X

O P I N I O N

I. Summary

We approve the request of American Telephone and Telegraph Company (AT&T) and McCaw Cellular Communications, Inc. (McCaw) for authority to transfer indirect ownership of 15 of McCaw's regulated California utilities. This transfer is the California manifestation of a merger of AT&T and McCaw, under which McCaw will become a wholly owned subsidiary of AT&T. We find that the merger meets the statutory requirements of Public Utilities (PU) Code § 854: it provides net benefits to customers, it does not have an adverse effect on competition, and it is in the public interest.

We also approve a settlement arrived at by most of the active parties in this proceeding. The settlement provides additional assurance that the merger will result in public benefits and fair competition.

II. Background

A. History

On August 24, 1993, AT&T, McCaw, and Ridge Merger Corporation[1] filed a joint application seeking the Commission's authorization to transfer indirect control of the 15 regulated

1 Ridge Merger Corporation is a wholly owned subsidiary of AT&T formed solely to facilitate the merger of AT&T and McCaw. (Application (App.), p. 6.)

California telecommunications utilities listed in the caption.[2] The transfer arises from the proposed acquisition by AT&T of a controlling interest in McCaw and the resulting conversion of McCaw into a wholly owned subsidiary of AT&T, a transaction that will be referred to as the merger. Neither AT&T nor McCaw is regulated by this Commission (although each has subsidiaries that are regulated California utilities). Consequently, the merger itself is not subject to our jurisdiction; it will be reviewed at the federal level.

Thus, the transaction before us is AT&T's indirect acquisition of McCaw's interest in the 15 California utilities.[3] The acquisition is indirect because McCaw will continue to exist as a corporation, and the 15 California utilities will continue to be owned by McCaw. However, AT&T will exchange shares of its stock for the outstanding stock of McCaw, and McCaw will become a wholly owned subsidiary of AT&T. Thus, AT&T will acquire indirect but actual control of the 15 California utilities.

The 15 utilities include 12 facilities-based cellular telephone companies, one paging and radiotelephone company, and two resellers of interLATA long distance telephone services.

The application was protested by the Division of Ratepayer Advocates (DRA) and jointly by Cellular Resellers Association, Inc. and ABS Telephone Company (CRA). Toward Utility

2 McCaw also holds a 22.20% interest in Santa Cruz Cellular Telephone Inc. and a 24.87% interest in Cellular 2000. (App., p. 7.) Applicants apparently did not deem the transfer of these interests to constitute an acquisition or control under PU Code § 854, so the transfer of these interests was not included in this application.

3 McCaw's interest in these utilities is frequently held through subsidiaries. In addition, McCaw's affiliates own a majority interest in LIN Broadcasting Company, which holds substantial interest in some of the 15 utilities.

Rate Normalization (TURN) requested hearings in a "Response" to the application which was docketed as a protest.

In response to a request in the ruling of the Administrative Law Judge (ALJ) of September 21, 1993, prehearing conference (PHC) statements were submitted by applicants; DRA; the Cellular Agents Association (CAA); Latino Issues Forum, Chinese for Affirmative Action, the San Francisco Black Chamber of Commerce, the Mexican-American Political Association, and the American G.I. Forum (the Public Intervenors); and Pacific Telesis Group, Pacific Bell, PacTel Cellular, Los Angeles SMSA Limited Partnership, and Sacramento-Valley Limited Partnership (Telesis). All of the PHC statements except applicants' expressed concerns about the proposal.

The PHC, held on October 13, considered the scope of this proceeding and set a tentative schedule for serving prepared testimony and for hearings. Complying with that schedule, applicants submitted their opening testimony on October 22. At the second PHC of November 8, applicants revealed that they had had fruitful discussions with DRA and requested additional time to pursue those discussions before firming up the schedule for hearings. That request was granted. Shortly after that, applicants and DRA arrived at an agreement in principle and noticed and held a settlement conference on November 17.

Applicants and DRA converted their agreement in principle into a written draft settlement, which was served on all parties on December 2. A second settlement conference was held on December 7, and on December 8 applicants, DRA, and Public Intervenors signed the settlement agreement. CRA later also signed the settlement and entered into another agreement with applicants. The latter agreement has not been submitted for our approval and will not be further considered here.

On December 9, applicants filed a motion to adopt the proposed settlement agreement under Rule 51.1(c) of the

Commission's Rules of Practice and Procedure and a motion to shorten time to comment on the proposed settlement. The ALJ's ruling of December 15 granted the latter motion and set January 3, 1994 as the due date for comments on the proposed settlement. Telesis and CAA filed comments contesting the settlement under Rule 51.5, and Public Intervenors filed comments reiterating their support for the settlement. Applicants filed comments responding to Telesis' comments on January 19, and DRA and the Public Intervenors also filed reply comments in support of the settlement.

Telesis and CAA supported their comments with prepared testimony submitted on January 10, and applicants submitted rebuttal testimony on January 20. The California Attorney General (AG) submitted his opinion on the effects of the proposed transaction on competition in California on February 9.

The result of all this procedural activity is that we have before us the issue of whether to approve the proposed settlement as proposed by the motion of December 9, in light of the comments of Telesis and CAA and subject to our determination that the settlement is "reasonable in light of the whole record, consistent with law, and in the public interest." (Rule 51.1(e).) By approving the settlement, we necessarily also grant the approval requested in the application. We are able to conclude that the settlement is consistent with law and in the public interest because we have satisfied ourselves that the application's proposal meets the requirements of PU Code § 854.

B. **The Applicability of § 854(b) and (c)**

Early in this proceeding, a question arose whether the proposed transaction fell under the provisions of PU Code § 854(b) and (c).[4] No party disputed that § 854(a) required the

4 All statutory references are to the PU Code unless stated otherwise.

Commission's approval of the acquisition even if subsections (b) and (c) did not apply. However, some of the proposal's characteristics--particularly the indirect nature of the acquisition and the shared ownership of large-revenue utilities--created uncertainty about whether the more specific findings of subsections (b) and (c) needed to be made in this proceeding.

These issues were resolved when applicants agreed that the application should be treated by the Commission as if subsections (b) and (c) unquestionably applied. In keeping with this approach, applicants submitted testimony addressing all of the necessary findings of § 854.

We will follow applicants' lead and evaluate the settlement and application under the requirements of subsections (b) and (c). We do so as a matter of convenience and expedience, and this approach should not be viewed as precedent on the application of § 854 to similar transactions.

C. **The Nature of the Record**

Rule 51.1(e) requires us to determine that the "settlement is reasonable in light of the whole record." In this case, no evidentiary hearings were held, and the nature of the record that can form the basis for this conclusion requires some discussion.

Telesis contends that the record is incomplete and inadequate to form the basis for the § 854 determinations. Telesis is correct in the sense that we have do not have before us sworn evidence that was subject to cross-examination by adverse parties. But we do have before us extensive materials that we may properly consider in arriving at our decision on the proposed settlement. Parties have presented factual material in the application, PHC statements, various motions, comments, and prepared testimony. All of these materials are subject to the obligation of anyone who signs a pleading, enters an appearance, or transacts business with the Commission "never to mislead the Commission or its staff by an

artifice or false statement of fact or law." (Rule 1.) In addition, much of the material in the application or in support of various motions is verified under penalty of perjury. Even unverified prepared testimony, submitted in anticipation of sworn oral testimony, could be relied on to some extent, with due consideration given to the fact that its sponsor has not been subjected to cross-examination.[5] Under Rule 73, the Commission may also take official notice of matters that may be judicially noticed. Finally, to the extent that arguments and opinions, rather than facts, are asserted, we may use logic to evaluate those arguments and opinions and may accept the portions that survive this scrutiny. All these sources provide a record we may use to determine whether to accept the settlement.

Telesis misinterprets the intent of our settlement rules. Telesis' position, if taken to its logical extreme, would require us to conduct evidentiary hearings in every case in which a settlement is presented for our approval. To a great extent, this interpretation would negate one of the primary benefits of settlements, the avoidance of litigation. The practice Telesis advocates would also be administratively cumbersome.

D. **The Requirements of Section 854**

Subsections (b) and (c) of § 854 set out some specific requirements that the Commission must meet before approving the

5 Administrative agencies are generally given more latitude to consider hearsay evidence than are courts, particularly in jury trials. Under the California Administrative Procedures Act (which does not govern the Commission's proceedings), otherwise objectionable hearsay is allowed "for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding." (Government Code § 11513(c).) The federal Administrative Procedures Act is even more liberal: it allows virtually all oral and written evidence but encourages individual agencies to provide for exclusion of "irrelevant, immaterial or unduly repetitious evidence." (5 U.S.C. § 556(d).)

acquisition or control of large California electric, gas, or telephone utilities.

Subsection (b) requires the Commission to find that the proposed transaction provides net benefits in the short and long terms and to adopt a ratemaking method to ensure that ratepayers will receive the forecasted benefits. The Commission must also find that the transaction will not adversely affect competition. The Commission must request an opinion from the AG on this issue.

Subsection (c) requires the Commission to find that the transaction is in the public interest, after considering and balancing seven criteria: the financial condition of the resulting utility; the quality of service to ratepayers; the quality of management of the resulting utility; the effect on union and nonunion employees; the effect on shareholders; the benefits to state and local economies and to the communities served by the resulting utility; and the Commission's ability to regulate and audit utilities. If significant adverse consequences are identified, the Commission must provide mitigation.

Subsection (d) requires the Commission to consider options to the transaction, including not allowing the proposed acquisition or control. The acquiring utility (in this case, AT&T) has the burden of proving by a preponderance of the evidence that the requirements of subsections (b) and (c) are met.

E. <u>The Settlement</u>

Under the settlement, applicants commit to take certain actions to allay the concerns raised by DRA and others and to clarify that the transaction will meet the requirements of § 854. A copy of the settlement is attached as Appendix B. In broad summary, the settlement commits the merged company to do the following:

- Provide McCaw's cellular customers[6] with equal access to interexchange carriers (IECs) so that customers may use the IEC of their choice for long distance calling.[7]

- Provide consumer benefits by using technology to improve service, by improving customer services, and by increasing research and development.

- Make capital improvements to McCaw's cellular facilities over the next two years.

- Maintain net employment levels at McCaw's California cellular utilities for two years.

- Use AT&T's systems and expertise to assure that McCaw's cellular utilities comply with the Commission's orders concerning Women, Minority, and Disabled Veteran Business Enterprises (WMDVBE).

- File various reports with the Commission and maintain McCaw as a separate entity for reporting purposes for two years.

In addition, the settlement asks that we open a proceeding to permit us to address issues related to the merger or implementation of the settlement.

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6 The settlement defines applicants' obligations only with respect to the California cellular utilities "over which McCaw has the ability to exercise majority voting control." (Settlement, p. 3.)

7 When the former AT&T was broken up, the nation was divided into Local Access and Transport Areas (LATAs). The Regional Bell Operating Companies (RBOCs), such as Pacific Bell, are currently barred from completing calls across LATA boundaries. With some

F. **Contested Issues**

Telesis and CAA contest the settlement.

Telesis has general concerns about the effect of the transaction on competition and particular concerns about the effect on equal access, bundling of services, price discrimination, barriers to entry, influence over industry standards, delaying technological innovations, and market concentration.[8] Telesis also raises some procedural objections to the settlement.

CAA believes that the settlement does not meet the requirements of § 854(b). Section 854(b)(1) requires a merger to provide net benefits to customers, and CAA alleges that illegal marketing activities of AT&T and McCaw disadvantage existing and would-be cellular customers. These practices also discourage competition in violation of § 854(b)(2), CAA says. These actions appear to be aimed at putting cellular agents out of business, thus denying customers the personal service that agents can provide.

Under Rule 51.6, contested settlements usually result in hearings on the contested issues as soon as possible. In this case the ALJ, after consulting with the Assigned Commissioner, issued a ruling cancelling hearings on January 27. We affirm that ruling.

The determination not to proceed to hearings was made only after we received and reviewed Telesis' and CAA's contesting comments; applicants', DRA's, and the Public Intervenors' reply comments; Telesis' prepared testimony; and applicants' prepared

8 Telesis' comments were accompanied by a motion for leave to file portions of its comments under seal. The sealed material was alleged to contain proprietary business information of applicants received by Telesis subject to a confidentiality agreement. The motion was granted by the ALJ's ruling of February 3. We will attempt to honor Telesis' and applicants' request for confidential treatment of this material, and we will try to make only general reference to the contents of the sealed documents.

rebuttal testimony. We believe that this material fairly reflected the type of information and arguments that might have been presented at the hearings. It was clear from a review of this material that the outcome of this case would not depend on our resolution of specific disputed facts. The parties' implicitly concurred in this conclusion by presenting testimony consisting chiefly of the opinions and arguments of experts in the fields of economics and antitrust. A review of this material led to the conclusion that the key disputes in this case concerned the nature of the telecommunications industry, and the extent of and prospects for competition in various industry segments. While facts are necessary to resolve these disputes, the important facts are either undisputed or so general that the ruling concluded that hearings to refine those facts would be a waste of time and resources. We believe that today's opinion bears out the ruling's conclusion.

G. **Organization of the Discussion**

The present posture of this proceeding presents us with two related decisions: Should the settlement be approved, and should the application be approved? The resolution of the latter question turns largely on whether applicants have met the necessary burden of proof under § 854. The provisions of the settlement impose specific obligations on the applicants to ensure that the requirements of § 854 are met.

The interrelated nature of these issues will make it convenient for us to combine our consideration of the three main elements of our discussion--the requirements of § 854, the provisions of the settlement, and the comments contesting the settlement. The requirements of § 854 supply the overall framework of the discussion; the terms of the settlement and the objections to the settlement will be incorporated into the appropriate section on the elements of § 854.

III. Net Benefits

Section 854(b)(1) requires the proposal to "provide net benefits to ratepayers in both the short-term and long-term, and provide a ratemaking method that will ensure, to the fullest extent possible, that ratepayers will receive the forecasted short- and long-term benefits."

The assessment of benefits in this case is complicated by the fact that this merger, even more than other recent mergers, is a paper transaction. The specific action we are asked to approve is the change in ownership of McCaw; McCaw's California utilities will remain the property of McCaw. More important, because the merger involves two companies in essentially different lines of business, no consolidation of operations affecting the 15 McCaw California utilities is proposed at this time. In other mergers, consolidation is usually the key to the savings that are cited as the net benefits to ratepayers. Because of the nature of this transaction, applicants have not quantified (with some exceptions) the benefits they believe the merger produces.

A second complication is that we do not presently impose cost of service ratemaking on McCaw's California subsidiaries. They operate in fields that are largely competitive, and our regulation of these fields is correspondingly relaxed. The consideration of the appropriate "ratemaking method" must recognize the nature of our regulation of these companies.

Applicants claim that several benefits will result from the merger in the short term:

- McCaw's customers will benefit from technological service improvements, including "roaming," the network's ability to reroute a cellular customer's call automatically from his or her home service area to another service area. (Direct Testimony of Lewis M. Chakrin (Chakrin), p. 30.) The combined system can use AT&T's Integrated Service Digital Network (ISDN)